



April 22, 1999

Mr. Lou Bright
General Counsel
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711-3127

OR99-1069

Dear Mr. Bright:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123538.

The Texas Alcoholic Beverage Commission (the "commission") received a request for "all investigative reports, narratives, or notices received (anonymous or otherwise) which in whole or in part initiated or substantiated" a particular investigation. You submitted to this office for review various responsive documents labeled as Attachments C-1, C-2, and C-3. You contend that these documents, except for front page offense report information, are protected from disclosure under the informer's privilege aspect of section 552.101, and also sections 552.103 and 552.108 of the Government Code.

You have marked information in Attachment C-1 that you contend is confidential under the informer's privilege as protected by section 552.101 of the Government Code. Texas courts long have recognized the informer's privilege, *see Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928), and it is a well-established exception under the Public Information Act, Open Records Decision No. 549 at 4 (1990). For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. *See Open Records Decision Nos. 515 at 2-5 (1988), 391 (1983)*. In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Although the "informer's privilege" aspect of section 552.101 ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 285 at 1 (1981), 279 at 1-2 (1981); *see also* Open Records Decision No. 208 at 1-2 (1978). This may include enforcement of quasi-criminal civil laws. *See* Open Records Decision Nos. 515 at 3 (1988), 391 at 3 (1983). The privilege excepts the informer's statement itself only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 (1990). However, the exception is inapplicable if the identity of the informer is known to the subject of the communication. Open Records Decision No. 202 at 2 (1978).

We have reviewed your arguments and the marked information in Attachment C-1. We agree that most of the marked information may be withheld from disclosure under the informer's privilege. We have flagged some pages that we re-marked to show the information that may be withheld from disclosure under the informer's privilege.

You contend that the records that comprise Attachment C-2 are protected from disclosure pursuant to section 552.108 of the Government Code, and have submitted a letter from the Dallas County District Attorney asking that the records be withheld under section 552.108 because release would interfere with pending prosecution.¹ Section 552.108(a)(1) provides an exception from disclosure for information that is held by a law enforcement agency or prosecutor and that deals with the detection, investigation, or prosecution of crime, when release of such information would interfere with the detection, investigation, or prosecution of crime. This section may be invoked by the proper custodian of information relating to an ongoing investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987). Based upon the information you have provided, we agree that the information

¹We note that your correspondence indicates that you have provided the requestor with front page offense report information. Section 552.108(c) provides that basic offense report information is not protected from disclosure under section 552.108. Basic information is the type of information that is generally included on the front page of an offense report, including a detailed description of the incident. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.--Houston [15th Dist.] 1975), *writ ref'd n.r.e. per curiam*, S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976).

contained in Exhibit C-2 is protected from disclosure under section 552.108(a)(1) of the Government Code.

You next assert that information contained in Attachment C-3 is protected from disclosure under section 552.103 of the Government Code, except for the front page offense report information that has already been released. *See* Open Records Decision No. 597 at 3 (1991). To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.), *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental entity must meet both prongs of this test for information to be excepted under section 552.103(a). We agree that you have shown criminal litigation is pending and that the records at issue are related to the pending litigation.

We note, however, that once information has been obtained by all parties to the litigation, no section 552.103(a) interest generally exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, you may withhold the records at issue that the opposing party to the anticipated litigation has not seen or had access to. We note that the applicability of section 552.103(a) also ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/ch

Ref: ID# 123538

encl. Submitted documents

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